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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. .....

BELLINGHAM FROZEN FOODS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Did Petitioner, who purchased the assets of a bankrupt employer and engaged in the same type of business as the bankrupt, become a successor employer, required to recognize and bargain with the labor organization which represented the employees of the bankrupt, even though Petitioner, through non-discriminatory hiring decisions, did not hire a majority of its full complement of employees from the ranks of the bankrupt's employees?

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bellingham Frozen Foods, Inc., a Washington State corporation, by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed August 14, 1980.

OPINIONS BELOW

The National Labor Relations Board (herein Board) issued its Decision and Order herein on September 1, 1978, reported at 237 NLRB 1450. Bellingham Frozen Foods, Inc. (herein BFF) petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Decision and Order. The Court entered an opinion, reported at

.... F.2d ...., 105 LRRM 2404 (1980), enforcing, in part, and denying, in part, the Board's Decision and Order. The Court's opinion and order denying rehearing are reprinted in the Appendix (separately bound) commencing on page A-1 and the Board's Decision and Order is reprinted in the Appendix commencing at page A-33.

JURISDICTION

The opinion of the Court of Appeals was entered August 7, 1980, and its order denying a rehearing was entered September 26, 1980. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Labor Management Relations Act, 1947, as amended, more particularly Title I thereof, Amendments of the National Labor Relations Act, Sections 8(a)(5) and 9(a), 29 U.S.C. §§ 158(a)(5) and 159(a), respectively, which read:

> Sec. 8. (a) It shall be an unfair labor practice for an employer —
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * *
>
> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such

grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

For some years prior to 1977, Bellingham Frozen Foods, a division of San Juan Packers, Inc. (herein SJP) operated a frozen food processing plant at Bellingham, Washington on land sub-leased from Bellingham Cold Storage, Inc., who was the lessee of the municipality of the Port of Bellingham. SJP owned the processing machinery, harvesting machinery and the plant equipment; its product was stored by Bellingham Cold Storage until shipped.

The processing season for the plant began each year in early July with the arrival of the pea crop, followed by beans, corn and carrots. The processing work, historically, including SJP and BFF, was performed by seasonal employees, the first of which were hired in July. Some seasonal employees were employed until the end of processing season, usually December, sometimes January.

The plant employed nonseasonal workers of two types, (1) maintenance employees and (2) repack employees. All vegetables purchased by SJP and BFF were and are processed into frozen product. (Court's opinion of August 7, 1980, p. 2 line 10, Appendix p. A-3, erroneously states that BFF and its processors sold fresh as well as frozen produce.) All product is initially stored in bulk. Repack is putting bulk frozen product into small containers as specified by the customers to whom the product is sold and shipped.

Early in 1977 SJP filed a petition in bankruptcy. In February 1977 Frank Brooks, later an incorporator of BFF, submitted a bid to the bankruptcy court to buy the plant and harvest equipment of SJP, but not its inventory of frozen product. Brooks acted on behalf of himself and four other potential investors.

While the bid was pending, Gordon Hayes, one of the five potential investors, requested a meeting with Marven Eggert, chief executive officer of General Teamsters, Warehouse, Food Processing, Cannery Workers & Public Employees Local Union No. 231 (herein the Union), which represented SJP's production and maintenance (herein also referred to as P&M) employees. The meeting was held March 16, 1977. Hayes told Eggert of the investors' attempt to acquire SJP assets and operate the plant for a processing season in 1977. Eggert testified, without contradiction by other evidence, as follows concerning what Hayes said about staffing the plant if it were to be operated by Hayes' group: (Transcript of proceedings 284:12-285:10 and 287:2-19.)

Q. As best you can try to relate what Mr. Hayes said to you and what you said to him.

A. Okay. Gordon said there had been some problems in the plant—obviously, the company went bankrupt. 'We do have some problems in the plant. We're not particularly sure what they are other than there has been some abuse, we think. I've seen some beer bottles around the area and I suggest or I recognize that as a problem.' We had discussed previously with management and also I advised Gordon that management was, in my opinion, spending too much time at the yacht club and harbor house and that they are to direct the crew. He knew that was a problem. He said there would be changes and also he told me there were some people he did not want

to call—probably would not call back because—I'm not sure if he used the term 'bummers' or 'bad apples' but in any event, there were some that were on the seniority list that they probably would not want to recall because of their—I was going to use the words work habits but I think that's my wording, I don't think that is his. Whoever he had discussed this with, there were some people they didn't want to have return.

He also advised me that in line of the office clerical, that they would want to bring in their own employees in the office.

* * *

A. I recall explaining to Gordon about the farm contract and in that line we got into a discussion on the Teamsters and the farm workers situation. I explained to Gordon that we did not represent the farm workers; that is, those people who drive the tractors and work the combines and so forth. We only represented the mechanics under the farm shop contract.

Q. When Mr. Hayes made reference to the fact that there were some people, whether he used the term bummers or whatever; that he was concerned about calling back, do you recall saying anything on that subject?

A. Yes. I believe it was at that meeting that I said we had had a contract or a seniority list in existence for a number of years and I was sure that the bummers had been weeded out, and we couldn't imagine having any—I didn't say that—that the bummers had been weeded out and that we wouldn't see a problem. If he had a specific problem—someone he had specific problems with, we would be able to discuss that and I am sure reach an understanding on it.

Shortly after the conclusion of the March 16 meeting Hayes telephoned Eggert and asked Eggert to send a copy of SJP's agreement with the Union; Eggert immediately sent an assistant to Hayes' office with a copy of the SJP contract.

On Friday, April 1, 1977 the investors learned of the Bankruptcy Judge's approval of the sale. Hayes immediately contacted Gary Tripp, SJP's then manager, and the plant manager selected by the investors. He told Tripp to invite all maintenance employees of SJP (including those on lay off status) to report for work on Monday, April 4, 1977 if they wished to work for BFF.

All SJP maintenance employees were hired by BFF on April 4, 1977 and commenced work. BFF did not hire repack employees, as such, until its new repack facilities were ready in August 1977. BFF had no product to repack until it processed peas in July. SJP stayed in business by continuing repack with its own employees through July 1977. As they became available, BFF hired all SJP's repack employees who applied with BFF, putting them to work in plant preparation or production work until BFF had repack work.

On April 14, 1977 Eggert called on Hayes at the BFF plant to discuss representation of the employees, and asked BFF to assume labor contract delinquencies of SJP. Hayes denied any obligation to assume SJP's delinquencies. Eggert testified concerning Hayes' reply to Eggert's request for a contract at Tr. 291:21-25:

> Gordon said we don't have any problem in the area of health and welfare but we sure do in the area of pension; specifically, the pension contribution to seasonals. He said that seven and a half cent contribution for seasonals is ridiculous.

Concerning recognition and bargaining, Eggert further testified at Tr. 293:24-294:3:

Q. Do you recall anything else being said at that time?

A. Yes. We talked in general terms about the industry contracts. Gordon said they had their own operation

> and were not interested in becoming involved in an industry contract situation.

The meeting concluded by Eggert stating he would send a contract proposal, modified from the standard area agreement for the industry, so as to meet BFF's expressed preference for a contract of its own.

By letter dated April 19, 1977, R.Ex.1, Eggert sent a proposed contract to BFF. BFF answered by letter dated April 22, R.Ex.2, which reads:

> In response to your letter of April 19th, I wish to point out that Bellingham Frozen Foods is a brand new organization. We neither assumed the existing San Juan labor agreement nor would we be considered as a successor to the San Juan operations.
>
> As noted in your letter, we have at this time hired only maintenance employees who constitute a very small fraction of the work force comprising the former bargaining unit. Therefore, it may not be possible to determine until we have hired our full complement of employees whether Teamsters Local Union 231 is in fact the bargaining representative representing a majority of the employees in the unit.
>
> As I previously told you, we are feeling our way along in a number of situations. Obviously, we want to be cautious about making any long-term commitments in a hasty fashion. Under the circumstances, we do not feel that the negotiation of a labor agreement with your union is either mandated or desirable for our company at this time.

Later, formal negotiations for a contract took place. Several meetings, including one with a federal mediator, all foundered on BFF's refusal to grant recognition to the Union as the exclusive representative of a bargaining unit composed of both seasonal and nonseasonal employees. All the negotiating meetings took place before BFF hired any seasonal employees. BFF refused to grant recognition for

seasonals on the ground it had not yet hired seasonal employees. Contrary to the Board's findings, affirmed by the Court of Appeals, BFF never expressed opposition to agreeing to a bargaining unit which included seasonals, BFF only said it would not grant recognition in a unit including seasonals until the Union's majority status in such unit could be ascertained. The Union refused BFF's proffered recognition as representative of a unit limited to nonseasonals, a group where the Union concededly had majority status. On June 27, 1977 BFF filed two petitions with the Board designated Cases Nos. 19-RM-1421 and 19-RM-1422 seeking certification elections in either a unit limited to seasonal employees (RM-1422) or a combined unit of seasonal and non-seasonal (RM-1421). Thus, BFF's willingness to bargain in a combined unit of seasonals and nonseasonals was conclusively established by its filing of the petition in RM-1421. All BFF sought was evidence of majority status. By letter dated September 27, 1977 the Board's Regional Director dismissed both of BFF's petitions because of the issuance of the complaint against BFF in NLRB Case No. 19-CA-9603 alleging that BFF was a successor to SJP.

Terms and conditions of employment for BFF's seasonal employees, different from those for SJP's seasonals, were determined by BFF in June 1977 without notice to or bargaining with the Union, and before any applicant for a seasonal job was offered employment by BFF.

Historically, including SJP and BFF, seasonal hiring starts in July when about 30 are hired for pea processing. Seventy more seasonals are added in late July or early

August as bean processing is added along with peas. Pea processing ends in September, is supplanted by corn, which adds 60 more seasonal employees; carrots supplant beans about mid-September adding about 70 more seasonals. The full complement of well over 200 seasonals is reached durthe corn/carrot pack.

BFF's bi-weekly payroll period records, adduced at the Board hearing, adjusted even to include first and second line supervisors as employees in the unit (which adjustment adds to the number of former SJP employees hired by BFF) show the following workforce complement and percentage of former SJP employees employed in the combined unit of nonseasonal and seasonal production and maintenance employees (dates show ending date of pay period): Aug. 6 — 165 (43%); Aug. 20 — 196 (38.7%); Sept. 3 — 195 (38.9%); Sept. 17 — 196 (37.7%); Oct. 1 — 265 (27.5%); Oct. 15 — 253 (29.2%); Oct. 29 — 247 (30.3%); Nov. 12 — 204 (37.2%). The hearing on the Board's complaint began November 15, 1977, after the full complement of seasonals had been hired, but before the 1977 packing season ended.

Thus, when BFF had hired its full complement of its production and maintenance employees, nonseasonals and seasonals, the majority of its production and maintenance unit employees *had not* come from the ranks of SJP's production and maintenance unit.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked by Petitioner pursuant to Section 10(f), National Labor Relations Act, 29 U.S.C. § 160(f).

ARGUMENT FOR GRANTING THE WRIT

A. The Undisputed Facts Are Insufficient, as a Matter of Law, to Place BFF Within the "Perfectly Clear" Rule of *Burns*

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1973) this Court laid down guidelines to be used in determining a successor employer. The words from *Burns*, relied upon by the Court of Appeals, are the following from 406 U.S., pp. 294-295:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then *that the bargaining representative represents a majority of the employees in the unit as required by §9(a) of the Act, 29 USC § 159(a).*

(Emphasis added.)

The material facts in this case are not disputed. It is the legal consequences which flow from those undisputed facts which Petitioner contests. Petitioner submits that Hayes did not, in his preliminary inquiry conference with Eggert on March 16, 1977, indicate a perfectly clear intent by BFF to retain all of SJP's production and maintenance employees. Rather, as testified to by Eggert, Hayes stated: First, that BFF would not be hiring any of SJP's office workforce. Second, he was unwilling to say that all SJP production and maintenance employees would be hired.

Hayes reserved the right to decide, at a later time, which of SJP's production and maintenance employees would be hired by BFF, telling Eggert that some SJP employees might be "bummers" or "bad apples".

The preliminary and indefinite nature of BFF's hiring intentions, as stated by Hayes to Eggert on March 16, 1977, were certainly natural. At that point the investors who would incorporate BFF had not received approval of the sale by the bankruptcy court, had not hired a plant superintendent or a single management staff person, had not had an opportunity to take applications from SJP employees, or to review their performance. Nor can it be said that Hayes led Eggert to believe that BFF would offer the same terms and conditions as SJP had, since the main reason Hayes called on Eggert was to find out what SJP's union contract terms were. A copy of SJP's union agreement was requested by Hayes and delivered to Hayes immediately after his March 16 meeting with Eggert.

While it is true that BFF hired all of SJP's maintenance employees on April 4, 1977 (about 20 of the P&M unit which eventually reached 265), no decision or thought was given to recruiting seasonals until June. In June 1977 Hayes approved initial terms and conditions for BFF's seasonals, different from those in SJP's union agreement, and also a list of former SJP seasonals who would be considered eligible for hire by BFF. Not all SJP seniority holders applied to BFF.

Hayes' preliminary and noncommital statements to Eggert on March 16, 1977, were not a "perfectly clear" statement of BFF's hiring intentions; to conclude they were is simply stretching the undisputed facts well beyond the legal breaking point.

B. Assuming, *Arguendo*, That It Was Perfectly Clear BFF Intended to Retain All of SJP's P&M Employees, If for Lawful, Nondiscriminatory Reasons a Majority of BFF's Production and Maintenance Workforce Did Not Come From the Ranks of SJP's Employees the *Burns* Perfectly Clear Rule Does Not Make BFF a Successor to SJP

In its opinion, p. 7 lines 27-30 (Appendix p. A-16) the Court of Appeals states:

> When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain with the Union commences immediately.

This is generally true, because in most instances a purchaser's initial perfectly clear intent to retain all of the predecessor's workforce becomes an actuality. However, experience since *Burns* was decided has demonstrated that it does not follow, axiomatically, that the employees involved will consent to, or be available for, the intended retention. Where, by perfectly lawful conduct in recruiting and hiring, the possible successor's perfectly clear intent is not sufficiently effectuated, the new employer, a potential successor, may not become an actual successor because the element of majority, the statutory *sine qua non* of an obligation to recognize and bargain, must still be met. No majority hiring from the predecessor's employees means no successorship, regardless of perfectly clear intent.

The statutory majority requirement was specifically adverted to, more than once, by this Court in its *Burns* decision. There is the language at 406 U.S. 294-5, set forth *supra*. Earlier in its *Burns* decision this Court referred to the majority *sine qua non* stating at 406 U.S. 277:

> We address first Burns' alleged duty to bargain with the union, and in doing so it is well to return to the specific provisions of the Act, *which courts and the Board alike* are bound to observe. Section 8(a)(5), as amended by the Labor Management Relations Act, 1974, 29 USC § 158(a)(5), makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 159(a) of this title.' Section 159(a) provides that '[r]epresentatives [are] designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .' *Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative.*

(Emphasis added.)

It is submitted that the "perfectly clear" sentence in *Burns* was not intended to change the basic statutory requirement of majority status. Nor could such a statutory change be made by an administrative agency or court, even this Court.

The Board, itself, and another United States Court of Appeals have held that the hiring of a majority from the workforce of the predecessor must follow the *Burns* perfectly clear intent, or there is no successor. *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978), affirming the Board's decision in *The Boeing Company*, 214 NLRB 541 (1974); *Spruce Up Corporation*, 209 NLRB 194 (1974). It is submitted that a square conflict exists between this District of Columbia Circuit decision and that of the Ninth Circuit in the case at bar.

The Ninth Circuit attempts to distinguish *Spruce Up* and *Boeing* on the ground that employment by BFF was not conditioned on proposed different conditions. (In fact, as to seasonals, it was—Hayes testified, without contradicting evidence of any kind, that BFF established different wages and conditions for seasonals from SJP's, doing so in June 1977, a month before any seasonal employee was hired by BFF, and, as early as April 14 Hayes had told Eggert that pension coverage for seasonal employees was ridiculous.) But the major reason that *Spruce Up* and *Boeing* are not properly distinguished is that the Court of Appeals for the Ninth Circuit has merely focused on the apparent reason why the employees of the predecessors in *Boeing* and *Spruce Up* chose not to come to work for the potential successors. It is submitted that their reasons for not accepting employment are not material. It is not the reasons which motivate the employees of the predecessor not to accept employment with the new employer, but rather the result that majority of the employees of the new employer did not come from the ranks of the predecessor that prevents successorship.

Every case cited by the Court of Appeals in its opinion herein in support of its conclusion that BFF is a successor to SJP involves a fact situation where the new employer's workforce contained a majority drawn from the ranks of the predecessor. Except for the case at bar, there is no case subsequent to *Burns* where either the Board or a Court of Appeals has found successorship absent majority hiring.

Of course, if the new employer illegally discriminates against applicants from the old employer, then the remedy of instatement for those applicants may produce the required majority, but BFF was not charged with such dis-

crimination. *E.g., D.R.C. Incorporated,* 233 NLRB 1409 (1977); *Houston Distribution Services, Inc.,* 227 NLRB 960 (1977). It is not surprising that BFF was not alleged by the Board to have discriminated in hiring, for of 208 employees who held seniority at SJP, only 108 applied to BFF. Of those 108, 100 were offered jobs by BFF, *i.e.,* 93.5% of those applying were offered a job.

In addition to the conflict between the Circuit Courts, there has been an ongoing conflict among the Members of the Board as to the proper meaning of the *Burns* "perfectly clear" exception. Beginning in *Spruce Up Corporation, supra* (dissenting opinions), Board Members Fanning and Penello have consistently taken the view that the majority requirement of § 9(a) does not apply to the employees of a new employer which decides to retain the employees of the old employer, even though some of the employees choose not to accept the intended retention by the new employer, and the majority of the new employer's employees had not worked for the old employer. An example of this continuing view is the dissenting opinion of Board Members Fanning and Penello in the Board's decision in *The Boeing Company, supra,* where they say at 214 NLRB 542:

> However, despite all the foregoing positive factors pointing to the "substantial continuity of identity in the business operation before and after a change" in employer, (footnote omitted) the Administrative Law Judge failed to find that Boeing was a successor to TWA because a majority of its ISS unit employees at the takeover on April 1, 1971, did not consist of TWA incumbents, and he found this failure of a majority could not be attributed to unlawful unilateral reduction of wages by Boeing. While as set forth hereafter, we disagree with the latter finding, without regard to how one determines the pretakeover bargaining

issue, we do not for the reasons articulated in the separate dissents in *Spruce Up, supra* find the lack of majority to be fatally deficient in establishing the successorship of Boeing.

In *Spruce Up* we agreed:

> Successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit. In making that determination, the question of whether employees of the predecessor actually predominate over other employees can hardly be the acid test of successorship, although it may be an important factor in determining whether the successor employer has a basis for doubting the Union's majority status. (Footnote omitted.)

The fallacy of insistance upon majority population is fundamental. Whether or not an employer has the status of a successor cannot turn in any part of its own decision to populate its work force with more than half or less than half of the predecessor's employees.

Also see footnote 3 from the Board's decision in *Pinewood Care Center, Inc.*, 242 NLRB 86 (1979), which reads:

> 3. As explained in his partial dissent in *Spruce Up Corporation*, 209 NLRB 194, 203 (1974), a case relied upon by the Administrative Law Judge in the instant case, Chairman Fanning believes that under *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the bargaining obligation of a successor employer commences at the point when an employer manifests an intent to retain the employees of its predecessor, rather than at the point when a successor actually employs a majority of its predecessor's employees. See also *Charles Starbuck and Diane Starbuck d/b/a Starco Farmers Market*, 237 NLRB No. 52 at fn. 4 (1978).

Until the case at bar, Board Members Fanning and Penello were never able to muster a majority of the Board to

support their view that majority status of the new employer's employees is immaterial when perfectly clear intended retention is shown.

A short hypothetical may more clearly expose the legal error of the Fanning/Penello/Ninth Circuit viewpoint. Assume Seller (S) and Purchaser (P) agree, in writing, to buy/sell the assets of S's business so that P can carry on S's business. S has a union contract covering a bargaining unit consisting of three employees, A, B, and C, whom P agrees, in the written purchase/sale agreement, to retain. S is to terminate operations June 30; P is to commence July 1. P goes to A shortly before July 1 and tells A of the sale, his promise to retain him, and asks A to report for work July 1. P says nothing to A, nor in his later contact with B and C, about any decision to have terms or conditions of employment different from S. A decides he prefers to retire and declines P's offer of employment. For other reasons, both B and C decline P's offers of employment. P hires D, E and F, who did not work for S, and none of whom had designated the union as their bargaining representative. P starts in business on July 1 with employees D, E and F. By the Ninth Circuit's view, P is S's successor and must recognize and bargain with the union. If P hired only C, and new employees D and E, the Fanning/Penello view would make P a successor since their substantial number requirement (in this hypothesis 33%) would be met, even though the statutory majority requirement would not be.

Petitioner submits that the Fanning/Penello/Ninth Circuit position is contrary to the provisions of the N.L.R.A. and to the proper interpretation of the *Burns* "perfectly clear" exception. The "perfectly clear" exception, if given

the Fanning/Penello/Ninth Circuit interpretation, does not apply §§ 8(a)(5) and 9(a) of N.L.R.A., it amends those provisions, by removing the basic element of the intended industrial democracy established by the U.S. Congress, *i.e.*, the principle of majority rule. Under the Fanning/Penello/Ninth Circuit interpretation of the *Burns* "perfectly clear" dictum, the choice of representation is made, not by the majority of the employees of the new employer, but by the choice of the employees of the old employer, many, or all of whom, may, for an infinite variety of lawful reasons, never become employees of the new employer. Surely this result was not the intention of this Court.

Inexplicably, the Ninth Circuit had previously made the correct analysis of the successorship majority rule principle in its decision in *Pacific Hide & Fur Depot, Inc. v. NLRB,* 553 F.2d 609 (9th Cir. 1977) where it noted at page 613:

> The problem then becomes one of defining what is meant by a "full complement." That cannot be done by the application of a mathematical formula but only by considering the facts of each case in light of the general goal which is sought—*to assure majority rule within the new employer's unit* as to whether and if so with what union there must be collective bargaining.

(Emphasis added.)

Equally inexplicable is the fact that the Ninth Circuit had, prior to *Burns,* dealt with an attempt by the Board to fix successorship obligations on a new employer who had drawn less than a majority of its unit employees from the ranks of the old employer. The court found the Board without legal authority, under § 9(a) N.L.R.A., to make the new employer a successor. *NLRB v. John Stepp's Friendly Ford,* 338 F.2d 883 (9th Cir. 1964).

It is submitted that the correct application of the disputed *Burns* "perfectly clear" exception, is to make it read:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of the predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit, *[and in which it is also perfectly clear that the employees intended for retention have manifested acceptance of retention by the new employer]*. . . .

It is submitted that this suggested added expression to the "perfectly clear" dictum of *Burns* is no more than what has been clearly there, by implication, all along. The Fanning/Penello/Ninth Circuit view demands that this clear implication be converted to direct statement.

At p. 10, line 20 of the Opinion the Court of Appeals (Appendix page A-23) it finds that BFF voluntarily recognized the Union. Certainly BFF's letter of April 22, set forth *supra,* denies recognition. Only the Hayes/Eggert March 16 and April 14 meetings preceded this April 22 letter by BFF, and it is not clear that Hayes extended recognition as to seasonals in those meetings. It makes no difference. Well before the first seasonal employee was hired by BFF in July 1977, BFF had told the Union that it would not recognize it for seasonals until they were hired and the Union's majority status in a combined unit of nonseasonal and seasonal production and maintenance employees could be ascertained. Therefore, any recognition by BFF would have been pre-hire as to seasonals. Prehire recognition by BFF, if it had taken place, would have been an unfair labor practice. *Garment Workers v. NLRB,* 366 U.S. 731 (1961); *Majestic Weaving Co., Inc.,* 147 NLRB 859 (1964). Indeed, even in the only lawful pre-

hire recognition situation, that permitted by § 8(f), N.L.R.A., 29 USC § 158(f), for construction industry employers, such recognition does not render the union so recognized a majority union and thus a § 9(a) exclusive bargaining representative. Even though lawful, the pre-hire recognition permitted construction employers creates only a voluntary, not mandatory, duty to bargain, which recognition may be freely dissolved by subsequent action of the employer, absent the union's proof of attainment of majority support. *NLRB v. Iron Workers*, 434 U.S. 335 (1978). It is legal error to hold that a pre-hire grant of recognition by BFF was lawful or created § 9(a) status.

Again using the hypothetical, if P were to give exclusive recognition to the Union as the representative of D, E and F, it would be a violation of their rights to be unrepresented, § 7 of NLRA, 29 USC § 157. Such interference by P with his employees' rights would constitute an unfair labor practice under § 8(a)(1) NLRA, 29 USC § 158(a)(1) and also a grant of illegal assistance to the Union in violation of § 8(a)(2), NLRA, 29 USC §158(a)(2). If the union assumed to act as the exclusive representative of P's employees when a majority of P's employees had not chosen it, such union conduct would be an unfair labor practice and a violation of § 8(b)(1)(A), 29 USC § 158(b)(1)(A). *Garment Workers v. NLRB; Majestic Weaving Co., Inc., supra.*

CONCLUSION

For the reasons stated, the Petition should be granted.

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